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Courts or Tribunals? Federal Courts and the Common Law

BY

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Courts or Tribunals? Federal Courts and the Common Law

Peter L Strauss*

"I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."
O.W. Holmes, Collected Legal Papers 295-96 (1920).

"I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here en bloc."
O.W. Holmes, J., dissenting, in Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) .

"[T]he standard so fixed scarcely advances the solution in a concrete case; it only eliminates the egregious, leaving the tribunal a free hand to do as it thinks best. But that is inevitable unless liability is to be determined by a manual, mythically prolix, and fantastically impractical. ... In the end [my judgment] may seem merely a fiat, but that is always true, whatever the disguise."
Learned Hand in Sinram v. Pennsylvania R. Co., 61 F.2d 767 (1932).

In his masterpiece, *A Man For All Seasons*, Robert Holt puts his protagonist, Thomas More, into conversation with his son-in-law Roper. Rich, an evil character who will bring More's downfall, has just left the stage:

Roper: While you talk he's gone!

M: And he should go, if he was the Devil himself, until he broke the law!

R: So now you'd give the Devil the benefit of the law!

M: Yes. What would you do? Cut a great road through the law to get after the Devil?

R; I'd cut down every law in England to do that!

M: Oh? And when the last law was down and the Devil turned round on you -- where would you hide, Roper, the laws being all flat? This country's planted thick with laws from coast to coast --

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man's laws, not God's -- and if you cut them down -- and you're just the man to do it -- d'you really think you could stand upright in the winds that would blow then? [Quietly] Yes, I'd give the Devil the benefit of law, for my own safety's sake.

These words stand as an important warning to us today, as we work to contain and destroy the Devil himself. They can serve, too, to introduce the less dramatic subject I had chosen when you honored me with your invitation to give the Meador Lecture, well before the recent horrors so disturbed us all. I chose as my text a recent Supreme Court dictum that had seemed to me to knock over quite a few trees: “Raising up causes of action where a statute has not created them may be a proper function for common law courts but not for federal tribunals.”¹ What? When Article III established the federal judiciary its drafters imagined something other than a court, as that term would then have been conventionally understood, something different in kind from the black-robed members of state judiciaries? To invoke a special class of “federal tribunal” whose actions are not to be confused with those of common law courts suggests broader implications than the long-familiar debates about *Erie*, or the more recent contentions over when if ever it is appropriate to infer privately enforceable judicial remedies in aid of federal statutes; this seems to be about the nature of the institutions, not elements of their jurisdiction or prudential rules for the exercise of their powers. The question has a lot less importance than diverting the dagger currently aimed at America’s heart and the world’s liberties. But the aside was uttered in *Alexander v. Sandoval*, a case that came to the Court from here in Alabama, and it directly evokes Professor Meador’s lifetime of scholarship about federal courts. At the time it was hard to imagine a more appropriate subject for this lecture; I hope you will forgive my continuing to address it, even as we honor our dead and confront yet again the truth of enduring evil in our world.

Justice Antonin Scalia is the author of these words – he is quoting himself, as he likes to do, from an earlier, lonelier concurrence. And there is some reason to think that, so far as common law *method* is concerned he remains alone. In another of last Term’s decisions, that I have written about in a different context, he was the sole dissenter from an opinion by Justice Souter that relied on the potential for case-by-case development of an imperfect statutory framework to resolve a difficult issue of federal administrative law – that is, the classic common law approach to resolution of an issue the Court concluded had not been crisply resolved by Congress or its prior decisions.² Justice Scalia’s dissent angrily insisted on forcing what would be, in my judgment, an unnatural and unwise reading, to avoid any such inquiry, necessarily subjective in his view. Justice Souter, writing for all the other members of the Court, remarked that

¹ *Alexander v. Sandoval*, U.S. , (2001), quoting Justice Scalia’s separate concurrence in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991).

² *United States v. Mead Corp.* 121 S.Ct. 2164 (2001), discussed in Peter L. Strauss, Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element, 53 Admin.L.Rev. 803 (2001); see Larry Kramer, Judicial Asceticism, 12 Cardozo L. Rev. 1789, 1798 (1991).

“Justice Scalia’s first priority over the years has been to limit and simplify. The Court’s choice has been to tailor deference to variety. ... Our respective choices are repeated today.”

Yet while the Court as whole continues, perhaps unsurprisingly, to deploy the familiar methods of the common law – insisting, notably, on the force of precedent as well as the possibility of case by case development of doctrine – its members also join with some regularity in expressing doubts, as in *Sandoval*, about federal courts fashioning law in the common law way. Indeed, modern times have brought greater scholarly and judicial ferment about the judicial function than perhaps we have seen since the New Deal. The Court’s work and the commentators engender the sense of a virtual revolution, whether the subject is respect for congressional judgment about social fact,³ debates over the proper approach to statutory interpretation,⁴ or – my subject tonight – suggestions that the courts of state judicial systems and the “federal tribunals” of the national judiciary fundamentally differ in their nature. America has gone through more than one cycle of judicial activism and retreat – the activism sometimes in service of liberal principles and sometimes conservative ones; the retreats often under the banner of expressed appreciation for the appropriate limits on judicial function. We are again, at least ostensibly,⁵ in a retreat phase. Yet this retreat is marked by a quarrelsomeness in relation to Congress, a skepticism about its instructions, that should signal to us that not only judicial modesty is in the air. Professions abound that the courts should act as faithful servants of Congress in interpreting statutes, for example; yet one overhearing the conversations between master and servant – seeing how they bicker, how uninterested the servant appears to be in the context within which its master issued its instructions, how insistent it is on deploying its own sense of syntax – could wonder just how “faithful” is the service being rendered.⁶

While strong-minded judges and debates over the propriety of judicial activism are hardly a new phenomenon, all courts today – state as well as federal – face three linked challenges that put our common-law suppositions about judicial process under considerable stress. These are the increasingly

³ A. Christopher Bryant & Timothy J. Simeone, Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes, 86 Cornell L.Rev. 328 (2001); Neal Devins, Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis, 50 Duke L.J. 1169 (2001), William W. Buzbee & Robert A. Shapiro, Legislative Record Review, 54 Stan. L.Rev.87 (2001); Larry Kramer, Foreword: We the Court , 115 Harv.L.Rev. 1 (Nov. 2001), all discussing cases such as *City of Boerne v. Flores*, 521 U.S. 507 (199) and *United States v. Morrison*, 529 U.S. 598 (2000). [add others]

⁴ Manning/Eskridge debates in Colum.L.Rev.

⁵ I am not the only commentator to find in the current phase a remarkable activism, in the sense that the Court is essentially dismissive of settled expectations, either of the legal community or of the legislature, in pursuing its own vision of the proper state of the law. Kramer, Aleinikoff & Shaw, Strauss (SupCtRev), others?

⁶ Francis Lieber *Legal and Political Hermeneutics* 28-31 (1839); Peter L. Strauss, *the Common Law and Statutes*, 70 U.Colo.L.Rev. 225 (1999); Stevens in *WUVH*, 449 U.S. 83 (1991); *Reynolds v. Martin*, 985 F/2d 470, 475 n. 2 (1993).

statutory character of law, the proliferation of legal issues, and the explosion of judicial dockets. We could see an number of linked results from these challenges: a heightening of judicial discretion over what issues get decided; an emphasis then on law-making rather than case-deciding as the basis on which this discretion gets exercised; a dramatically lowered exposure of trial and intermediate courts to principled public correction; and a temptation for the high court, then, to speak in simple terms it might expect to have broad impact rather than respond to the subtle particulars of complex facts. I want just briefly to set these challenges and their results before you, and then turn to some recent Supreme Court decisions that may illustrate the troubles, and shed some light on Justice Scalia's *Sandoval* claim.

There are many important differences between today's courts and those the Framers might have imagined – our very ideas about such matters as precedent and stare decisis, as Judge Alex Kozinski pointed out in an interesting opinion published last month,⁷ owe a great deal to conventions about the writing and publication of opinions that did not emerge until the Nineteenth Century. Among the most important of these differences, in my judgment, is the conversion of appellate review into a discretionary exercise substantially controlled, for its own ends, by the reviewing court.⁸ We have conferred on the judiciary's highest levels essentially free choice when to act; and our expectations are that they will choose with reference to law-making rather than party claim to justice. Whether we imagine judicial lawmaking as secondary or primary, these changes transform and deeply challenge the rationales we have for tolerating it.

Prior to this century, to the extent people understood that courts independently shaped the law, they would have understood that this function – what we can call the common law function – emerged from the necessity to decide cases according to reason driven by party fact. This was a passive function, a corollary of the obligation to decide, according to reason, any matters that parties put before them. One looked first to established principle, to the force of stare decisis; if existing law did not control, the court still had to decide – and the absence of controlling principle did not entail an automatic judgment for defendant.⁹ Rather, the court was then to look to considerations of justice – what analogy to the established structures of law best fit the facts on which the court was compelled to render decision – and of policy – what outcome would best govern future cases that the court could imagine following upon this one, once decision in the pending matter had acquired precedential force. The obligation to decide not only excused the judicial presumption in lawmaking – new law was merely and unavoidably its byproduct, the preferable alternative to automatically dismissing claims not previously provided for – the obligation to

⁷ Hart v. Massanari

⁸ But see Edward Hartnett, Questioning Certiorari

⁹ Viz., “It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other.” *Priestly v. Fowler*, 3 Mees, & Wells 1, 150 Eng.Rep. 1030 (Exchequer of Pleas 1837).

decide also gave the polity some assurance against programmatic judicial lawmaking. The parties chose the disputes, not the courts; the necessary force of the court's decision was limited to the material facts of the case before it; the facts of the next case, uncontrollable by the judges, might well compel a conclusion looking in quite the opposite direction from its predecessor. Common law development was in this sense the product of an invisible hand, if you like, that ineluctably provided corrections to doctrinal drift in one direction by generating the facts and disputes that would illustrate its dangers. The "work of modification," Benjamin Cardozo remarked in his famous lectures on *The Nature of the Judicial Process*, "goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of the moving glacier."¹⁰ They grow out of repeated exposures to fact and perspective, exposures over which the judiciary had little control.

Justice Holmes, in an oft-cited dissenting passage, framed this understood authority in a way that highlighted its subsidiary character:

I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common-law rules of master and servant and propose to introduce them here en bloc.¹¹

The necessity of the case, within the pre-existing general framework, set the confines within which judges could act and, in acting, further confine those whose judgment would follow after theirs.

How different the judicial function has become since the Judges' Bill created a power to choose which matters our highest court would hear! Decision is no longer a necessity, nor new law merely its by-product. A court with certiorari authority is not merely able, but is expected, to choose its targets with reference to what law seems most important to enunciate. Having thousands of petitions from which to select, say, 100 controversies for decision¹² enables judges to have agendas. It encourages them to speak more broadly than the particular facts before them require, counsel against that as we may.¹³ It permits them to defend themselves against the inconvenience of facts that might appear to compel movement opposite to the direction they prefer. And, thus, it inevitably heightens our sense that in appointing judges we are appointing lawmakers and should be concerned with the kinds of law they are likely to make. Freed from the discipline of the unavoidable call of justice, lured by the opportunity, perhaps even felt as

¹⁰ Lecture I, following n. 19.

¹¹ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (dissent; 1917).

¹² Numbers from the last Term in paid and pro bono dockets, HLR.

¹³ Cass Sunstein, *Leaving Things Undecided*, 110 Harv.L.Rev. 4 (1996) and *One Case at a Time* 10-11 and Ch. 9 (1999).

responsibility, to speak broadly, the judge can shape her agenda as she chooses. We are used to this in litigants, but not in judges. Even at intermediate levels of review, where appeal is a matter of right, the realities of opinion-writing and publication – 80% of decisions rendered essentially invisible to any but the immediate parties – entail similar possibilities and effects.¹⁴

Not often are the courts as candid about their power as was the New York Court of Appeals when it cemented for New York the change in tort law George Priest has characterized as “a radical overturn of 300 years of civil jurisprudence.”¹⁵ Its opinion opened with this remarkable sentence:

We granted leave to appeal in order to take another step toward a complete solution of the problem partially cleared up in [two prior cases, both of which were decided after the making of the orders being appealed from].¹⁶

While such candor is not often seen, and in this common law context the New York legislature could have corrected the court had it wished to, the state of mind toward judicial function thus revealed is strikingly different from what we ordinarily assume in rationalizing judicial development of the common law.

The limitations on decision at the highest courts not only tend to highlight their lawmaking function, but also suggest threaten the viability of the context-specific techniques of common-law reasoning. Dockets have swollen, and legal questions multiplied, but not the institution responsible for managing them. Thus, the very changes that called forth the certiorari function have strong implications for the Supreme Court’s possibility of generating coherence in the legal order, or effectively controlling the actions of lower courts. Questions arising under any one of the dozens of complex federal statutory schemes, with enormous financial or social consequences, will not be heard even once a year; no familiarity with that statute and its administration will result. A circuit judge who might have expected his written opinions to gain the Court’s attention three times a year when the Judges’ Bill was enacted, today must know that this will occur, on average, less often than once in three years.¹⁷ We head towards one law for the Ninth Circuit, another for the Third. The Justices of the Supreme Court, then, face a considerable temptation to follow Justice Scalia into relatively simple, either-or, bright-line rules – approaches that avoid the rich contextualism and modesty of classic common law reasoning, yet might from the Court’s perspective seem to promise control over adventurism in the lower echelons of the federal judiciary.¹⁸

¹⁴ Consider in this respect the debate between the Eighth Circuit, Judge Arnold writing, *Anastasoff v. United States*, 223 F.3d 898, vacated as moot on reh’g en banc, 235 F.3d 1054 (8th Cir. 2000) and the Ninth, per Judge Kozinski, *Hart v. Massanari*, 2001 U.S. App. Lexis 20863, F.3d (9/2001).

¹⁵ George Priest, *Strict Products Liability: The Original Intent*, 10 *Cardozo L. Rev.* 2301, 2302, 2329 (1989).

¹⁶ *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432 (1963).

¹⁷ Strauss, 150 Cases.

¹⁸ *Id.*; Schauer on textualism as a second best.

Thus, we might think courts – and not just federal courts – ought to be thought of in contemporary terms, certainly in terms transformed from what the Framers might have imagined. That rethinking is perhaps especially called for in constitutional contexts, where the Supreme Court’s voice tends to exclude the possibility of dialogue with Congress. You will want to read Professor Larry Kramer’s important Foreword to the November issue of the Harvard Law Review, that I had the privilege to read as a paper he delivered to my faculty this September.¹⁹ But my interest is at the more mundane level of ordinary law – federal and state statutes, regulations, and the common law. Here, what the courts do legislatures can undo, and one can fairly imagine the continuing processes that engage Congress, the agencies and the courts as a kind of continuing dialogue. If not in a century ago, in today’s statute and agency-dominated world, we can fairly characterize the judicial role in this dialogue as secondary – yet it is not absent, and it is here that Justice Scalia’s trenchant observation intrigues me. If in the constitutional context, as Prof. Kramer argues, the Court’s approach essentially excludes Congress from voice, in this more ordinary setting it appears to be denying its own law-generating competence.²⁰

Let me start by putting in front of you a contrasting formulation to Justice Scalia’s, framed by Justice Robert Jackson in the immediate wake of *Erie RR. v. Tompkins*, one of those few cases I think I can mention without having to tell you about it – at least for the moment:

The federal courts have no general common law, as in a sense they have no general or comprehensive jurisprudence of any kind, because many subjects of private law which bulk large in the traditional common law are ordinarily within the province of the states and not of the federal government. But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law. ... Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.²¹

For Justice Jackson, the field on which the Court might play was indeed a function of federal authority. In contrast to state law federal law is invariably interstitial and so cannot be “general.” Yet that does not render federal courts special “tribunals,” different in their nature from the common law courts of the states. “Were we bereft of the common law, our federal system would be impotent.”

I mean to speak principally this afternoon about the little-noticed majority and dissenting opinions in

¹⁹ Larry Kramer, *We the Court*, 115 Harv.L.Rev. 1 (2001).

²⁰ My thanks to Professor Kramer for suggesting this striking link between our papers.

²¹ *D'Oench, Duhme & Co v. FDIC*, 315 U.S. 447, 471 (Jackson, J., concurring)

Alexis Geier v. American Honda Motor Company, Inc.,²² a 5-4 decision from the next previous Term of the Supreme Court. Three of the four dissenting Justices in *Geier* also dissented from *Sandoval*, and so did not subscribe to that majority's "federal tribunals" characterization. Yet their *Geier* dissent seemed strongly to express the same sentiment, that federal judges and state judges are different in kind. That is where we will spend most of our remaining time. Before turning to *Geier*, however, I want first briefly to set before you some other illustrations of this problem, to set its context.

One, about which I have previously written, is the the Supreme Court's 1994 decision in *Central Bank of Denver v. First Interstate Bank of Denver*.²³ The question in the lower courts had been how to understand Central Bank's possible liability for aiding and abetting others' violations of SEC Rule 10b(5) in a private action First Interstate had brought under the authority of that rule. The possibility of private actions under Rule 10b(5) had long been established. For at least sixteen years, the SEC had been bringing enforcement actions against alleged aiders and abettors; all eleven circuit courts of appeal to face the question had also sustained private actions against aiders and abettors; Congress had thoroughly revised the securities statutes without any question being raised about this development. In the certiorari process seeking Supreme Court review, as well, the papers suggested no issue on this score. In a common law world, one would say the issue of aider and abettor liability had come to rest. The Supreme Court, however, reached out and asked for argument on the question; it then decided, on the basis of its conclusions about what the 1934 Congress had enacted, that aider and abettor liability could not be sustained. That judgment about the understanding of the Congress in 1934 might have been right or it might have been wrong. Justice Stevens, writing in dissent for four Justices, plausibly argued that the majority's interpretation was, to say the least, anachronistic. What I want to call to attention to for present purposes is the Court's striking independence in reaching out for an issue that parties had not raised, yet which served an agenda reflected in many decisions of the current majority, most recently *Sandoval* itself – that of subordinating private actions for the enforcement of federal regimes, that have not been directly provided for by statute. The Court used its certiorari prerogative to serve its own policy ends. And, as in *Sandoval*, those ends were to deny conventional common law moves to federal courts – and thus to terminate any sense of continuing legislative/executive/judicial conversation about the development of law, any sense of partnership in which courts provisionally work toward integration.²⁴ In the *Central Bank*

²² Cite [2000]

²³ 511 U.S. 164 (1994); Peter L. Strauss, On Resegregating the Worlds of Statute and Common Law, 1994 Supreme Court Review 429, 509 ff. (1995).

²⁴ It is important to distinguish here between the proposition that it is improper on, as it were, separation of power grounds for federal courts to infer a remedy Congress has not provided for, and the conclusion that a particular statutory scheme signals by its complexity, or by the judgments that have apparently been made, that it would be inappropriate to that statute to infer such a remedy. See, e.g., *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984). A standard judicial move, which until rather recently a member of Congress would have had every reason to expect, might indeed be inappropriate in particular circumstances, but that is not the voice of these opinions.

majority's contemplation, statutes and regulations are static texts – subject to future development only by the legislature or executive, yet to be accorded meaning by courts applying their own and rather independent syntactic views.²⁵

This want of sensitivity and attention to the possibilities of integration is suggested by an opinion from the Term just ended. *Egelhoff v. Egelhoff*²⁶ presented questions of preemption of state law by federal, another context where one might expect the fact-driven and cautious processes of the common law to dominate. David Egelhoff died intestate just two months after finalizing his divorce from his wife Donna. Under the terms of their settlement, she had received a business, an IRA account, and stock; he had retained 100% ownership of his pension and life insurance under his employer's plan. That plan was subject to ERISA, the federal statute regulating retirement plans. He had neglected to redesignate the beneficiaries under these benefits, so that when he died the primary beneficiary named in his policy remained "Donna Egelhoff wife." A Washington state statute provided for this contingency; in such a case, it said, non-probate assets should pass as if the divorced spouse had predeceased the decedent. Thus, they would go to his secondary beneficiaries under the plan, his children. ERISA, on the other hand, states that the federal statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employment benefit plan." Acknowledging that the operative terms, "relate to," were so indefinite as to threaten infinite preemption of state law, Justice Thomas's majority opinion nonetheless found that a state rule specifying a beneficiary other than the one mentioned in the plan would unacceptably burden plan administrators and so must be regarded as preempted.

It is striking that the majority, whose members have generally been so solicitous of state interests, gave the federal statute such broad sweep. As Justice Breyer's dissent observed, Washington law would be permitted to govern if Donna had actually predeceased David (or had murdered him); there is no necessary conflict with the federal statute; the injustice of the result commanded by the majority opinion is transparent; and it interferes with state judgments in contexts, those of inheritance and the consequences of marital dissolution, that are of central importance to state and not federal policy. It is virtually inconceivable that Congress would have chosen this outcome; the plan in terms contained provisions pointing at David's children as beneficiaries if his beneficiary designation was invalid – and making the designation invalid was what state law accomplished. The majority's response to these arguments was to advance highly improbable hypotheticals which, it asserted, could not be distinguished in principle from the case at hand. Even acknowledging the indeterminacy of the statutory language, it is as if they feared acknowledging any responsibility for reconciling state and federal law for themselves; it must all be placed in the lap of Congress or, rather, Congress's language as the judges chose to read it. For the dissent, the better course would be to "apply[] pre-emption analysis with care, statute by statute, line by line, in order to determine how best to reconcile a federal statute's language and purpose with federalism's need to

²⁵ Cf. *United States v. Mead Corp.*, (Scalia, J., dissenting).

²⁶ Cite

preserve state autonomy.” For the majority, perhaps conscious of the implications for their capacity to control the actions of lower courts, the development of a common law on the subject was not to be trusted.

The last preliminary case I’d like to mention before turning to *Geier* is *Rogers v. Tennessee*,²⁷ a case notable here less for its result than for Justice Scalia’s planting of what appear to be seeds for future developments along this line.²⁸ Wilbert Rogers stabbed James Bowdery in the heart in 1994; surgery to repair the wound failed to prevent Bowdery’s immediate loss of mental function and lapse into a coma from which he could not be expected to recover. Bowdery was maintained on life support for fifteen months, however, until a kidney infection carried him away, and so he did not die within a year and a day of the stabbing. A 1907 case had described death within a year and a day as a common-law element of second degree murder, the offense of which Rogers was convicted in state courts. That description need not have been taken as holding.²⁹ A 1989 statute had abolished common law defenses in the state, and might have been taken to abrogate this rule. Yet the Tennessee Supreme Court found that Tennessee law did encompass such a rule, and that it had survived that statutory change. Acting, then, in a common law mode, it found the rationale for the rule had lapsed, and so overruled it. In this context, with the year-and-a-day rule definitively established as having been a part of Tennessee law on the dates both of the stabbing and of Bowdery’s death, the question for the Supreme Court was whether abrogation of the rule deprived Rogers of due process of law, given its retrospective effect and the explicit constitutional prohibition on ex post facto legislation. Could a common law court make law, in this respect, in ways that a legislature could not?

I hold no brief for Justice O’Connor’s conclusion for a group identifiable as the five middle Justices of the Court, that Tennessee could constitutionally effect this change to Rogers’ detriment. Claims of unfairness arising from the characteristic retrospectivity of changes in the common law are often properly

²⁷ [121 S.Ct. 1693.]

²⁸ Justices ... with agendas which go beyond the just resolution of current cases are likely to plant seeds in opinions which can be nourished and made to bloom in later cases. The common law concept of dicta aims to inhibit and thwart such ploys. Accepted legal methodology instructs that general expressions in judicial opinions are to be geared back to the specific case facts which generated them. The problem is that judges who are willing to plant language in their opinions for future fruition will disrespect these methodological constraints, including the fact that the language appeared in a dissent, when it suits their purpose in a future case.

Richard Cappelli, A Legal Method Look at *Rogers v. Tennessee*,
<http://www.angelfire.com/pa4/cappalli/analysis.htm>, visited October 10, 2001.

²⁹ Id.

answered by arguments denying proper reliance – that one ought to have seen this change coming,³⁰ or that knowledge of the change could not be imagined to have affected the behavior concerned.³¹ The persuasiveness of these answers in the particular case of the criminal law does not turn on the Ex Post Facto Clause alone. Justices Scalia, Thomas, Breyer and Stevens – an unusual quartet – strongly dissented. What caught my eye in relation to today’s talk was that Justice Scalia took the occasion for a lengthy disquisition on the proposition that, as a historical matter, the authors of the Fifth Amendment’s Due Process Clause would not have thought common law judges had the “power to change the common law.”³² The discussion is hedged with qualifiers; both Justice Stevens and Justice Breyer, to varying degrees, distance themselves from it even so. Yet the remarkable fact is that it is there at all. It would not have been hard to dissent without it.

One senses here the further building of an argument, by one who professes no judicial authority to make law, for radical change in our conception of what it means to be a court – or, at the least, a “federal tribunal.” Justice Scalia conceded that the new American courts, that had so recently freed themselves from the English yoke, “felt themselves perfectly free to pick and choose which parts of the English common law they would adopt.” One of the great early figures of American law, Chancellor James Kent, describing his self-conception in late eighteenth century New York, wrote that

I took the court as if it had been a new institution, and never before known in the United States. I had nothing to guide me, and was left at liberty to assume all such English Chancery powers and jurisdiction as I thought applicable. ...This gave me grand scope, and I was checked only by the revision of the Senate, or Court of Errors. ...

My practice was, first, to make myself perfectly and accurately. ..master of the facts. ...I saw where justice lay, and the moral sense decided the court half the time; and I then sat down to search the authorities until I had examined my books. I might once in a while be embarrassed by a technical rule, but I most always found principles suited to my views of the case. ...³³

One would hardly suggest that judges of the time felt free to adopt any rule they chose; the system and broadly stated principles of the common law required adherence, even as the judge accommodated them

³⁰ Cf. *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947).

³¹ It is inconceivable that the wielder of a butcher knife inflicting numerous deep wounds would or could so calculate a stab penetrating his victim’s heart, meaning to cause death (a remaining element of the offense for which Rogers was convicted), that it would not to cause that death until more than a year and a day had lapsed.

³² Justice Scalia does not indicate why he takes late Eighteenth Century (Fifth Amendment) rather than Nineteenth Century (Fourteenth Amendment) readings of judicial function to be controlling.

³³ Laurence Friedman,

to the particular facts before him and to changing social circumstance.³⁴ Yet Justice Scalia's way of putting it appears to threaten these common law functions of dynamic accommodation and change, at least for "federal tribunals" – even at Justice Holmes' level of the molecular. The argument being built, the agenda apparently being pursued, is stunning indeed.

Now at last let us turn to *Geier v. American Honda*. This case was a minor event in the Supreme Court's 1999 October Term, yet a curious one in several respects. Ms. Geier had been driving her 1987 Honda, using the manual lap and shoulder belts with which it came equipped, when she ran her car into a tree. She suffered injuries more serious, she claimed, than she would have suffered had the Honda been equipped with a driver's side airbag [or other equally safe and effective passive restraint device].³⁵ The question presented was whether Honda could be held liable in a product liability action at common law for this failure to equip its product with a readily available safety device. Honda was in compliance with the then operative federal regulatory standard on passive restraint devices, which required that it equip only 10% of its fleet with passive restraint devices (not necessarily airbags); it had done so, but by equipping cars other than the one Ms. Geier happened to buy. Whether that compliance with federal standards operated to shield it from possible liability under the ordinary tort law of the jurisdiction required, *inter alia*, understanding two provisions of the federal statute in evident tension with one another.

Under 15 U.S.C. §1392(d),

Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

Under 15 U.S.C. §1397(k), however

Compliance with any Federal motor vehicle safety standard issued under this subchapter does not

³⁴ One readily understands in this way Judge Kent's contemporaneous refusal to reach a conclusion he knew judges of the continent would reach but that he could not reconcile with the premises of the common law, although "if the matter were *res integra with the common law*, I would be overwhelmed by the reasoning of the civilians." *Seixas v. Woods*, 2 Caines 48 (Sup.Ct. N.Y. 1804).

³⁵ The majority writes as if the claim was specifically that the Honda lacked an airbag; the dissent reiterates, with a cite to the joint appendix (App. 3) that Ms. Geier's complaint was about the absence of *any* "effective and safe passive restraint system, including, but not limited to, airbags," that might have reduced her injuries from those she suffered. Since she was wearing a buckled manual lap and shoulder belt at the time of the accident, it is hard to imagine that the alternative passive restraint devices that had been demonstrated to meet the requirements of Standard 208 at the time, automatic seat belts, would have been any more effective in preventing her injury than the manual devices she in fact used. While room was left for the development of alternative, cheaper and safer passive restraint systems in the Standard, nothing at the time (or in subsequent developments) suggests that this opportunity had been availed of by any manufacturer.

exempt any person from any liability under common law.

Nine Justices agreed that neither state legislative nor state executive authority could adopt requirements for vehicle safety differing from federal standards – that under the first of these provisions, state lawmaking on a subject otherwise easily within reach of state authority had been mjnsuspended. But judicial law-making power, it appeared, was reserved; and on the implications of this reservation the Court divided 5-4.

For the majority, Justice Breyer writing, the savings clause served only to preclude *automatic* preemption of common law authority. The Secretary in adopting any given standard could indicate special circumstances that would preclude a particular, conflicting state common law rule. If the Secretary did not do so, the courts might nonetheless be able to find a disabling conflict. Such a conflict was established, in this case, by the Secretary’s affirmative wish to require only gradual deployment of passive restraint devices. A common law standard of care imposing a universal obligation to equip cars with such devices would necessarily conflict with a federal standard that attached affirmative importance to gradualism, and so, the Court held, could not survive. Note that, as neither Congress nor the Secretary had made this judgment, the majority was, necessarily, asserting a law-making authority in the federal courts – corresponding roughly to the law-making authority the courts have exercised in “dormant Commerce Clause” cases excluding various state regulatory measures for conflict with interstate commerce .

For the minority, Justice Stevens writing, “this is a case about federalism,” about the respect owed state courts’ law-making powers. Acknowledging that Congress or the Secretary might have excluded state judges (as well as state executives and state legislatures) from acting in ways inconsistent with federal regulations, the minority stressed that this had not happened. Federal courts, it argued, could not appropriately develop the law in such a setting; they had necessarily to await instructions from the other branches, lest the traditional powers of state courts to create law be impinged. Justice Stevens’ opinion invokes the spectre of unelected “federal judges ... running amok” with authority that can be appropriately entrusted only to elected representatives.

The curiosities in the case are several. The majority for whom Justice Breyer wrote comprised the Chief Justice and Justices Kennedy, O’Connor and Scalia³⁶; the minority, in addition to Justice Stevens,

³⁶ In 1988, Justice Scalia was the author of *Boyle v. United Technologies Corp.*, 487 U.S. 500, that in effect extended to defense contractors the benefit of the “discretionary function” exemption from tort liability Department of Defense officials would enjoy under the Federal Torts Claims Act, for specifying design elements in military equipment that a court might otherwise find to have been defectively (negligently) designed. Over the dissents of the liberal wing of the Court as it then was, he found “uniquely federal interests,” at 505, warranting a uniform national rule to assess the possible liability of defense contractors – federal common law – and significant conflict between those interests and the operation of state law, at 507, if the design the federal government affirmatively required could be made the source of manufacturer liability for defective design. Justice Brennan, for Justices Blackmun and Marshall, dissented essentially on *Erie* grounds. Justice Stevens dissented on the basis of prudential concerns that in balancing “the conflicting interests in the efficient operation of a massive governmental program and the protection of the rights of the individual ... we should defer to the expertise of Congress.” At 532. For neither Justice Scalia nor Justice Stevens, it would appear, did some special characteristic of “federal tribunals”

Justices Ginsburg, Souter and Thomas. Usual lines of division, whether the broad liberal-conservative scale, or even other contexts for attachment to “federalism” as an important issue for the Court, do not appear.

Strikingly, for all the dissenting talk about the importance of the States and the traditional state common law function, as a technical matter this was not a case about conflict between federal and state law. As no Justice thought significant enough to address, Alexis Geier’s accident occurred in the District of Columbia. The common law developed there is federal common law,³⁷ its judges federal judges, as were the common law and the judges of the federal territories. Of course it might as easily have been Maryland or Virginia. But it was not. The constitutional status of the District of Columbia – for example, in respect of the Fourteenth Amendment’s requirement that states assure equal protection of the laws – has long been a challenge, perhaps best swept under the carpet as here. The habit of regarding the District as a state might even redound, one day, to the benefit of its citizens.

What these curiosities may do is direct our attention to the possibility that the real stakes here too have less to do with federalism, than with the question whether our national courts are courts in the same sense as are local courts – those in the states and those in the District of Columbia alike. Whether the federal airbag standard and the local common law rule being argued for were in such conflict that the two could not stand was, undoubtedly, a federal question. As that question had not been answered by Congress or by the Secretary of Transportation, it had to be answered by the federal courts. Federal judicial lawmaking – the judicial articulation of a controlling federal standard – the dissent argued, would be inappropriate, because local judicial lawmaking – the only kind of local lawmaking that remained even arguably available given §1392(d) – is so important. Judicial lawmaking in local judges is of central importance, even when other forms of lawmaking are forbidden local authorities. Judicial lawmaking in federal judges is suspect, raises the spectre of judges run amok, even when invoked in aid of detailed law created by other, legitimate lawmakers. A certain tension is evident between these two propositions.

Discussions of the common law authority of federal courts are conventionally framed by *Swift v. Tyson*³⁸ and *Erie RR v. Tompkins*³⁹. The rich literature appearing under their influence has invoked considerations of federalism, separation of powers, (relatedly) democratic principle, and changing conceptions about the nature of the common law to derive theoretical structures for this question.⁴⁰ The

distinguish them from their state counterparts.

³⁷ See n. 44 within.

³⁸ 41 U.S. 1 (1842).

³⁹ 304 U.S. 64 (1938).

⁴⁰ E.g., Edward A. Purcell, *Brandeis and the Progressive Constitution* (2000); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U.Pa.L.Rev. 1245 (1996); Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 Pace L.Rev. 263 (1992); Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99

spectre of judges who might run amok has a distinguished political history in this country, most prominently in relation to constitutional law (where the legislature is not available to control their running) but also in respect of judicial attitudes towards statutory interpretation and statutory intrusions on judge-made law, and also the common-law function simpliciter. Both constitutional and prudential concerns can be imagined to underlay these concerns: constitutional concerns about whether courts are permitted to be lawmakers in contradistinction to legislatures; and prudential concerns about the relative merits of legislative and judicial lawmaking, supposing the latter is permitted to occur.

Whether federal courts are *permitted* to be lawmakers might seem to have been settled, as Justice Jackson argued, by the Constitution's creation of a judiciary in the familiar English mold and reference in constitutional text to such common law concepts as the sanctity of contracts. To be sure, the Constitution vests in Congress "all legislative Powers" – that is, the power to enact free-standing statutes having the force of law. Courts uncontroversially lack any such power (save possibly an inherent authority to adopt rules of procedure to control their own business). Yet the common law system of precedent and *stare decisis* just as uncontroversially permits judges to find duties which they enforce against the parties, that one could not have found before they acted; and the system as a whole enforces a whole range of duties that draw their legal force *only* from accumulated judicial pronouncements. Thus, one might suppose that the constitutional description of judicial power, extending to "all cases, *in Law and Equity*, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," imagined that the federal courts Congress could create to exercise that power would be courts in the ordinary understanding – that is, common law courts or equity courts of that time, before the universal mergers of the twentieth century.

I risk here, as others have before me, a certain anachronism. For contemporary eyes, it is hard to escape the conclusion that courts make law when they enforce a duty or require adherence to a construction that was not previously certain, and the operation of *stare decisis* assures that this conclusion will be projected into future controversies. Further, we think of that law in positivistic terms – it is the law of New York, or Alabama, or the United States. As William Fletcher among others has shown,⁴¹ in the early years of the Republic federal (and other) courts acted as common law courts without necessary attention (save where "local law" was clearly in point) to the question which sovereign's law they were enunciating; what Holmes would later dismiss as a brooding omnipresence in the sky, the universality of this body of general principle was what made their work uncontroversial. Only when they had to tie the

Harv. L.Rev. 881 (1986); Thomas Merrill, The Common Law Powers of Federal Courts, 52 U.Chi.L.Rev. 1 (1985); William Fletcher, The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance, 97 Harv.L.Rev. 1513 (1984); Tony Freyer, Harmony & Dissonance: The *Swift* and *Erie* Cases in American Federalism (1981); Henry Monaghan, The Supreme Court, 1974 Term – Foreword: Constitutional Common Law, 89 Harv.L.Rev. 1(1975); Henry J. Friendly, In Praise of *Erie* – and of the New Federal Common Law, 39 N.Y.U.L.Rev. 383 (1964).

⁴¹ William Fletcher's The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance, n. 40 above,

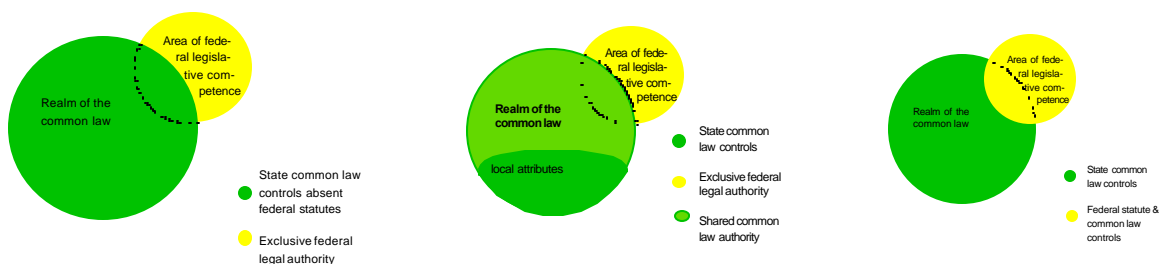
common law to the law of a particular jurisdiction did controversy arise; if federal courts could deploy the common law to define federal crimes, what would keep Congress within the limited law-making authority the Constitution had conferred?⁴² But in the midst of the disputes over states rights and slavery that would become the Civil War, Justice Story could write of universal principles of common law in *Swift v. Tyson* without provoking that concern. Federal courts were indisputably, uncontroversially common law courts, acting as all such courts did to enunciate principle even during those times – Llewellyn’s Golden Age or Gilmore’s Age of Discovery⁴³ – when they quite clearly understood that their task was accommodating general law, never expressed by anyone but judges, to the realities of a new continent and a new age.⁴⁴

⁴² *United States v. Hudson and Goodwin*, 7 Cranch U.S. 32 (1812). It seems unnecessary for these purposes to delve into the debates among William Crosskey and others over the precise extent to which common law and jurisdiction were tied. Crosskey finds in early history an understanding that federal common law could control state common law, William W. Crosskey, *Politics and the Constitution in the History of the United States* chs. 21-26 (1953). His work attracted extended critical responses by some distinguished reviewers that it would be an understatement to call insulting. See, e.g., Ernest Brown, 67 *Harv.L.Rev.* 1439 (1954); Henry L. Hart, 67 *Harv.L.Rev.* 1457 (1954); Julius Goebel, 54 *Colum.L.Rev.* 450 (1954). Yet the passages on federal common law expectations seem to have escaped these attacks, and drew praise from other distinguished commentators, Malcolm Sharp, 54 *Colum.L.Rev.* 439, 440 (1954); Irving Brandt, 54 *Colum.L.Rev.* 443, 450 (1954); Arthur Corbin, 62 *Yale L.J.* 1137 (1953); Charles Clark, 21 *U. Chi. L. Rev.* 24, 31 (1953); Grant Gilmore, *The Age of Aquarius: On Legal History in a Time of Troubles*, 39 *U. Chi.L.Rev.* 475, 485 (1972) and *The Ages of American Law* 117 n.3 (1977). Morton Horowitz’s *The Transformation of American Law 1780-1860* Ch. 1 (1977), suggests an awakening American realization that the common law was not a natural law artifact to be discovered but the product of human reasoning by authorized lawmakers acting in particular jurisdictions, that could be turned to social ends.

⁴³ Grant Gilmore, *The Ages of American Law* pp. 11 and 19 ff. (1977).

⁴⁴ The issue is not in my judgment settled by reference to the absence of a federal reception statute, as was sometimes argued. See *Wheaton v. Peter*, 33 U.S. 591, 658 (1834), discussed in Gilmore, *supra*, at 117 n. 3 and 121 n.22.. If such a statute were necessary, it would have been required for places where the common law had no connection to state authority, yet Congress’s performance in those contexts hardly exceeded in specificity the Constitution’s reference to “all cases in Law and Equity.” The Northwest Ordinance of 1787, 1 Stat. 51,52 states only that the court whose appointment is provided for “shall have a common law jurisdiction” and that the Territory’s inhabitants “shall always be entitled to the benefits of ... judicial proceedings according to the course of the common law.” See R. Kent Greenawalt, *The Rule of Recognitions and the Constitution*, 85 *Mich.L.Rev.* 621, 648-49 (1987).

Similarly, the laws creating the District of Columbia simply established them as having cognizance of “all cases in law and equity.” 2 Stat. 103 Sec. 5 (1801). Congress provided for the continuance in effect of the laws of the states from which the District was created, Virginia and Maryland, “until Congress shall otherwise by law provide,” 1 Stat. 130 Sec. 1 (1790) and 2 Stat. 103 Sec. 1 (1801), but never seems to have thought it necessary to free the east and west banks of the Potomac from the need to follow developing explications of the common law in Richmond and Annapolis, respectively; while heeding those jurisdictions’ constructions of statutes the District thus inherited, see *Hawley v. Hawley*, 114 F.2d 745 (D.C. Cir. 1940), *Clawans v. Sheetz*, 92 F.2d 517 (D.C. Cir. 1937), the D.C. courts appear to have made their common law their own. See *Busby v. Electric Utilities Employees Union*, 65 S.Ct. 142 (1944). While Prof. Fletcher reports early attention to the fact of these directions, his account also makes clear that the federal courts sitting on the Virginia (and, one supposes, Maryland) side of the Potomac felt no inhibition



Neither of the attorneys in *Swift* seemed to have thought the Court’s common law authority settled by earlier decisions. Their arguments suggested three possibilities I want to put before you in schematic form⁴⁵ – first, that in the absence of federal statute, state common law must control; second, the possibility we associate with the case, that outside the realms of local matters and federal statutes, state and federal courts shared a non-exclusive common law authority; and third, that common law judgments properly articulated by the Supreme Court independent of state common law – that is, within the reach of federal lawmaking authority – would be among the “Laws ... made under the authority of the United States”⁴⁶ by which state court judges would be bound. Note that it would not have been hard to conclude, although Justice Story did not explicitly state, that the case *was* within Congress’s lawmaking authority. It presented a standard problem of commercial law, and *Swift*’s attorney, hoping to avoid confronting defenses Tyson might have made under New York law against those to whom he had made the note, strongly argued a need for uniformity, grounded in the needs of interstate and foreign commerce. Implicit in the argument was our third possibility – that a federal rule, if proper, would control – in the same manner as federal admiralty law controlled the states, or the dormant commerce clause. The second possibility appears in the arguments of Tyson’s attorney, who argued as if, *should* the Court find authority to develop

following their own views of the best rule, where the *lex loci* was not involved. 97 Harv.L.Rev. at 1534 n.103 and 1541. See also *id.*, 1524-25, 1575 (little concern with reception statutes or like formalities).

⁴⁵ These diagrams make three assumptions: first, that the federal government has limited legislative authority; second, that this limited authority overlaps, but neither completely subsumes nor is completely subsumed by, the fields within which state courts uncontroversially might make common law; and, finally, that even if one were to allocate the realms within which state courts make common law between “general” and “local” subjects, at least some of the “general” subjects would fall outside the area of federal legislative competence. These propositions would surely have been agreed with in *Swift*’s time, although our expansive contemporary notion of federal legislative competence makes them more uncertain today.

⁴⁶ U.S. Const. Art. VI. Before reflexively dismissing the argument on the ground that “Laws” in the Supremacy Clause must mean “statutes,” and not the common law, the reader should pause to consider that the same clause’s “any Thing in the Constitution or *Laws* of any State to the Contrary notwithstanding” must certainly refer to the common law and, indeed, that the same proposition underlies the Supreme Court’s eventual reading of “laws of the several states” in Section 34 of the Judiciary Act of 1789 to refer to state common as well as statutory law as constituting the rules of decision in diversity cases.

a federal common law rule on the subject, that common law rule, of necessity, would be only for the federal courts. Since it would have no authority over state courts, he argued, it would permit a “perpetual confliction” between federal and possibly differing state law rules. The only proper conclusion, he argued, was that state law must apply.

The difference in premises might have seemed unremarkable to anyone who had followed the political struggles of the preceding decades, but has largely passed from view today. Justice Story wrote *Swift* as if he were addressing a natural field for national law. He discussed the commercial law issues in the case in a way that prominently suggested Congress’s ability to reach them under the clause empowering it to regulate interstate and foreign commerce. As a result, it was at least open to future courts to discover that the capacity of federal courts he was asserting had two qualities: first, that it was limited to matters respecting which Congress had authority to legislate; second, that this federal common law was binding on the states – in the same manner in which a state’s common law, on questions respecting which Congress could not legislate, would control the decisions of the federal courts (or the courts of any other state applying that law under conflicts of law principles) to which it applied. This is the state of affairs illustrated by the third diagram above: a limited domain for federal common law, coextensive with federal legislative competence, and within which federal common law is controlling on all courts, federal and state.

The federal courts did not develop *Swift* in this way. Rather, they took *Swift* to assert a privilege of the federal courts to declare “general” common law that was coordinate with the authority of the state courts (save only distinctly “local” questions reserved exclusively to the states); and over time the courts lost sight of any possible limitation of this privilege to settings within Congress’s legislative competence. The brilliant recent scholarship of Professor Edward A. Purcell, Jr.,⁴⁷ describes as “the most pervasive and enduring achievement” of the late Nineteenth-Century Supreme Court its movement “to establish the primacy of the national judiciary” in just this way. Justices like David Josiah Brewer

repeatedly ... voted to reaffirm the constitutional limitation on congressional power [over the insurance industry], and just as regularly used the authority of the federal courts to make general common law rules for insurance contracts. ... The Constitution gave Congress ‘no general grant of legislative power’ Conversely, Article III ‘granted the entire judicial power of the Nation’ to the federal courts, and its charter was ‘not a limitation nor an enumeration.’ Rather, Article III granted ‘all the judicial power which the new Nation was capable of exercising’ ... Thus, he established a more flexible and expansive test for judicial power than for legislative power, necessarily broadening the reach of the former beyond that of the latter.

This led, notoriously, to the results catalogued at length by dissenters and academics through the late nineteenth and early twentieth centuries: those who could use the diversity jurisdiction were sometimes afforded a choice of applicable law unavailable to other litigants; and federal courts purported to have the right to declare federal law on questions about which Congress could not legislate. Neither result was

⁴⁷ Edward A. Purcell, Jr., *Brandeis and the Progressive Constitution* [39-40, 46, 51-52, 55, 58] (2000).

intellectually sustainable.

Erie's dominant voice, its constitutional voice, is repudiation of Justice Brewer's interpolation, "the power to declare rules of decision which Congress was confessedly without power to enact as statutes," permitting diversity parties an unjustifiable choice of law when the "persistence of state courts in their own opinions on questions of common law prevented uniformity." The fault lay both in the presumption of acting outside federal legislative power, and in the (corresponding) failure to make the federal rule exclusive. "In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State" and, by empowering diversity parties to require decision on the basis of otherwise inapplicable general federal common law, denying the equal protection of the laws.

Just as *Swift* was read to claim more for federal courts that could properly be claimed, *Erie* can be read to *disclaim* more than it must – to insist, in effect, on the situation of the first diagram above. The paragraph that contributes most to this understanding is perhaps the following:

Third. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Consider, for example, "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts." This sentence can only be understood as referring to a power that could be independent of the legislative powers conferred on Congress by Article I, Section 8 of the Constitution. Congress had unhesitatingly declared such rules in contexts within reach of its power over interstate commerce, as in Section 8 of the federal Railway Safety Appliances Act of 1893⁴⁸ – a provision subsequently expanded upon to similar effect by the Federal Employees Liability Act:

That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

This provision is, transparently, addressed to the content of state common law as it would be applied in state court common law actions by railroad employees against their railroad employers. In the Senate debates over this provision, questions were raised about Congress's constitutional authority to adopt such

⁴⁸ 27 Stat. 531.

legislation, and answered in interstate commerce terms.⁴⁹

Congress's constitutional authority for this measure is beyond question. In an obscure but remarkable decision,⁵⁰ Justice Holmes – *Swift*'s most vociferous critic – built on that authority to discover a federal question authorizing Supreme Court review of a state court decision ostensibly applying state common law. Although the decision was closely divided on strongly held federalism grounds, with Justice Brewer in dissent, no Justice questioned the constitutionality of the statute, as none would today. A brakeman had been called upon to couple two railroad cars not equipped as the federal act required, under highly dangerous circumstances, and died in the effort when he lifted his head a bit too high between the cars as they came together. To his widow's suit in state court for wrongful death damages, the railroad counterposed a claim that he had been twice warned to keep his head down and had been contributorily negligent. The state courts, seeming to acknowledge the federal denial of "assumption of the risk" as a defense, found contributory negligence in this behavior. For the four Justices of the dissent, that ended the matter; the decision was one of state law, presenting no federal question for the Court. "If an iron is dangerously hot, and one knows that it is hot and is warned not to touch it, and does touch it without any necessity therefor being shown, and is thereby burned, it is trifling to say that there is no evidence of negligence." For

⁴⁹ Mr. Gray. I think there is a very serious objection to this amendment, and I have doubt about the right of Congress, in regulating the instrumentalities of commerce, to stretch its powers so as to regulate the contracts in every respect which may be made with these people. I have enough doubt about it to control my vote.

...

Mr. President, this amendment seeks to introduce to every one of our forty-four States an amendment to the common law of that State of a character more far reaching than any which has ever been before attempted by Congress, so far as I can now recall, by one enactment. We undertake now to prescribe to the courts in every State in this Union a rule in regard to negligence, a rule in regard to the liability of employers, and a rule in regard to the ordinary risk assumed by all persons who engage with their eyes open in certain employment, to be administered not only by the courts of the United States, but by the courts of every State in this country, whether that contravenes the policy of a State or not, whether, in the opinion of its Courts or in the policy adopted by its Legislature, such a rule be wise or not. I believe that this exercise of power by Congress in this respect is unnecessary, and that there is no exigency demanding so far reaching and radical an exercise of power as would be made by this amendment if adopted. ...

Senator, later Chief Justice, Edward White responded: I wish to make a very brief statement, if it be in order.

I entirely agree with the constitutional view expressed by the Senator from Delaware [Mr. Gray], but I do not think that constitutional view will operate to prevent me from voting for the amendment, because if there be a class of contracts which, under the Constitution is not brought within the purview of this section by the operation of this proposed law and the Constitution upon which it rests, then this proposed law will not affect that class of contracts; but if there be a class of contracts which it is within our constitutional power to legislate in reference to, then I think the provision will be a wise one, and the legislation will be valid to the extent of its constitutionality, and necessarily invalid wherever it extends beyond the limits of the Constitution.

[Congressional Record for Feb. 11, 24 Cong.Rec. Pt. 2]

⁵⁰ *Schlemmer v. Buffalo, Rochester & Pittsburg R. Co.*, 205 U.S. 1 (1906).

Holmes, the Court was called upon to protect the policy of the federal statute.

We cannot help thinking that ... the ruling upon Schlemmer's negligence was so involved with and dependent upon erroneous views of the statute that if the judgment stood the statute would suffer a wound. ... We are clearly of opinion that Schlemmer's rights were in no way impaired by his getting between the rails and attempting to couple the cars. So far he was saved by the provision that he did not assume the risk. The negligence, if any, came later. We doubt if this was the opinion of the court below. But suppose the nonsuit has been put clearly and in terms on Schlemmer's raising his head too high after he had been warned. Still we could not avoid dealing with the case, because it still would be our duty to see that his privilege against being held to have assumed the risk of the situation should not be impaired by holding the same thing under another name. If a man not intent on suicide but desiring to live, is said to be chargeable with negligence as matter of law when he miscalculates the height of the car behind him by an inch, while his duty requires him, in his crouching position, to direct a heavy drawbar moving above him into a small slot in front, and this in the dusk, at nearly nine of an August evening, it is utterly impossible for us to interpret this ruling as not, however unconsciously, introducing the notion that to some extent the man had taken the risk of the danger by being in the place at all.

So also, as has long been understood,⁵¹ the *Erie* paragraph's dismissive reference to "federal *general* common law," (emphasis added) must be read in the context of a case involving only diversity, and a question on which the Court assumes Congress lacks Article I authority to legislate.⁵² Within the area of Congress's legislative competence, neither the constitutional objection to federal common law making Justice Brandeis invokes – that the Court could not act if Congress could not – nor the injustices involved in having competing systems of law potentially applicable to the same dispute would present themselves. As in *Schlemmer* what was "assumption of the risk" had become a federal question from which Pennsylvania courts were not free to depart even by misnaming the basis for their action, federal common law within the area of Congress's legislative competence would be exclusive. Prudential questions might arise – suggestions that it would be preferable to await the judgment of Congress – but these are quite distinct from any claim that federal courts lack common-law authority; rather, they are reasons not to use it.

Such reasons are hard to find in *Geier*. Consider either of two possible statements of a local common law rule that might have been applied to decide whether marketing a car without air bags or the like amounted to marketing car with a design defect. In the 1930's, in a much admired and influential formulation, Learned Hand had written that

⁵¹ E.g., Henry J. Friendly, In Praise of *Erie* – and of the New Federal Common Law, 39 N.Y.U.L.Rev. 383 (1964).

⁵² Presumably Congress might have legislated on the duty of care interstate railroads, in particular, owed to pedestrians near their tracks; but the common-law proposition put was general, not one about special rules applicable to interstate railroads.

Indeed in most cases reasonable prudence [in equipping a boat] is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.⁵³

Much more recently, the American Law Institute proposed as its definition of “design defect” the following:

A product ... is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.⁵⁴

Both formulations constitute general common law tests, and one readily imagines a court undertaking to apply them, in the particular context of automotive air bags as that technology was known at the time Honda designed its 1987 cars. The *Schlemmer* question then becomes, whether federal judgments about the imperativeness of air bags (Hand) or the reasonable safety of cars without them (Restatement) are entitled to control. For the majority, preserving the integrity of the federal regulatory judgments in the particular instance overcomes the general saving of state common law judgments; permitting a state court to find the airbags “imperative” or their omission “not reasonably safe” in the face of the Secretary’s contrary judgment and her stated reasons for that would impermissibly wound the strong federal policy for uniformity reflected in the clear denials to state legislatures and executives of any possibility of taking action inconsistent with the federal standards.

At one point in his opinion for the dissent, Justice Stevens remarks

Before discussing the preemption issue, it is appropriate to note that there is a vast difference between a rejection of Honda’s threshold arguments in favor of federal preemption and a conclusion that petitioners ultimately would prevail on their common-law tort claims. I express no opinion on the possible merit, or lack of merit, of those claims. I do observe, however, that even though good-faith compliance with the minimum requirements of Standard 208 would not provide Honda with a complete defense on the merits, I assume that such compliance would be admissible evidence tending to negate charges of negligent and defective design. In addition, if Honda were ultimately found liable, such compliance would presumably weigh against an award of punitive damages. ...

⁵³ The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).

⁵⁴ Restatement Third of Torts

In so writing, he apparently relies on Section 4 of the Third Restatement⁵⁵ – itself (for these purposes) a proposition about state common law embodying no particular theory of federal-state relations.⁵⁶ Suppose that Ms. Geier’s case were permitted to go forward, and Honda sought a judicial ruling that, in the particular circumstances of Standard 208, the federal determination regarding “reasonableness” must be respected. To judge by earlier opinions, at that point Justice Stevens might agree that a federal question had been presented respecting the “merit, or lack of merit, of those claims.”⁵⁷ To give that question up, in the presence of undoubted federal legislative authority and weakened claims for state law (state legislative and executive action creating standards⁵⁸ clearly having been precluded) would be to dismember what the redoubtable Holmes characterized as the central pillar of the federal system.

Must the savings clause be understood, as the minority assumes, as a strong recognition of the continuing law-making authority of state courts, a blank check given them for whatever future developments they might choose in the particular context of auto safety? One could suggest alternative constructions that would not have raised the issues so troubling Justice Stevens.

First, it might have been read quite weakly: as a declaration by Congress that no rights existing when it acted (that is, *under the common law as it then was*) should be found prejudiced by its action. This is a rather common precaution against seeming to interfere with “vested rights,” and implies nothing about state courts’ law-making authority; it simply denies a purpose to interfere with such claims as may already exist under present state law. Many law suits would be preserved by even the weakest of these readings. Liability for “design defects” was not very well developed when the savings clause was enacted, but liability for manufacturing defects was. Section 1397 would defeat any argument that, for example, a

⁵⁵ §4(b) provides,

(b) a product’s compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.

⁵⁶ Comment (e) to §4(b), a kind of legislative history even the recent doubters of legislative history on the Court have been willing to consult, *Salinas v. United States*, 522 U.S. 52, 64 (1997), expressly disclaims as “beyond the scope of this Restatement” “[t]he complex set of rules and standards for resolving questions of federal preemption.” It would be particularly hard to find in the section a judgment that state common law judges should have a general power of reaching common law results disruptive to a federal legislative scheme, in circumstances in which that power had been explicitly denied state legislatures and executive bodies.

⁵⁷ *Merrrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 815 (1986).

⁵⁸ Suppose, my colleague Michael Dorf asks, a state legislature had adopted the Third Restatement formulation of “design defect” as statutory standard to govern civil liability, and the same question arose in that context. Now it appears that §1397 would not in terms apply (no “common law”) – nor might §1392 (no “safety standard,” in the probable intendment of those words). Nonetheless the preemption question framed by the majority would again be present.

manufacturer could successfully defend against liability for an accident that occurred when a particular turn signal it had manufactured proved defective, by showing that the manufacturing run of its turn signals met the federal standards created for its reliability. The latter showing would be sufficient to establish its “[c]ompliance with any Federal motor vehicle safety standard” from the federal regulatory perspective. One easily understands the judgment that that showing should not defeat liability for a manufacturing defect in a particular instance.

Preserving exactly such actions is most likely what any member of Congress who thought about the matter imagined the savings clause would accomplish. It was enacted in 1966, the very same year as Section 1397. As George Priest has interestingly shown,⁵⁹ the previous generation’s development of strict liability principles, culminating in the ALI’s adoption of Section 402A of the Second Restatement of Torts in 1966, was driven by concern with manufacturing defects, not design defects. A member of Congress thinking about the common law liability problem through that lens would not see frequent occasions for actual disabling conflict between common law principles of liability and the federal standards to be developed. She would not see a conflict between Section 1397 and her strong purpose to see that “motor vehicle safety standards be not only strong and adequately enforced, but that they be uniform throughout the country.”⁶⁰ She would simply wish to be sure that in authorizing the creation of standards, Congress did not interfere with the established remedies for manufacturing defects.

If one thinks, alternatively, that the savings clause should be read to leave some room for the development of state common law principles, there would remain the issue whether it was intended to pretermitt questions of consistency with particular federal standards. The “design defect” issue raises these questions rather dramatically. Section 402A came to be seen as having spoken to such defects; permitting them to be found evidently can lead to judgments in conflict with safety standards generated by federal regulation. It is hard to imagine, however, that a Congress that explicitly denied to state legislatures and executives any right to create policy in conflict with federal standards believed that it was important that state common law judges be able to do so, unsupervised.

Thus, the minority’s reading of the savings clause seems the least probable, as well as the most problematic. If we are to imagine Section 1397 as extending to new developments in common law, not just those existing when Congress acted, some possibility for judgment about the consistency of those state common law developments with federal policy, as applied in particular circumstances, seems essential. Inevitably, this would entail judgments of federal law and – just as inevitably – judgments that would often have to be reached in particular cases by federal courts. In its strong preference for federal executive or legislative action over federal judges running amok; but for unsupervised state court judges making law in matters denied to their corresponding legislatures and executives because it might disturb important elements of the federal program, the minority threatens to discard a central element of federal court

⁵⁹ George L. Priest, *Strict Products Liability, The Original Intent*, 10 *Cardozo L.Rev.* 2301 (1989).

⁶⁰ *Sen.Rep. No. 1301*, at 12 (1966).

authority and presents us with a disturbingly bifurcated view of the judicial role.

The importance of this issue is suggested by a datum marking the majority opinion's initial paragraphs. A number of courts, state and federal, had previously considered the relationship between sections 1392(d) and 1397(k). *All* the state courts had found against preemption in those cases; *all* the federal courts had found that state law had been preempted. Justice Holmes once remarked in relation to the Court's policing of interstate commerce issues that "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."⁶¹ The point is no less apt for preemption issues. As in *Schlemmer*, the importance of the Court's policing state common law for potential interference with federal programs, within the area of federal legislative competence, carries equal importance for the success of national government.

Federal questions are likely to involve statutes or regulations simply because today we live in an age of statutes and regulations. Yet inevitably those statutes and regulations will leave matters undecided,⁶² and in this respect analyses that look *only* at the statutory function, are misleading. Putting the issue in these terms brings the particular issues in *Geier* comfortably within the special case for "preemptive lawmaking" that Thomas Merrill has persuasively identified.⁶³ *It is* a case about federalism, but one in which successful federalism requires a national common law court to assert its control over state common law tribunals that may prove insufficiently attentive to national policy. A broader case for federal common law in the strong sense, in the interstices of Congress's action, would require an effort considerably more elaborate than the preceding paragraphs, and it is clear enough that the dominant judicial sentiment is unreceptive.⁶⁴ Yet even as to the exercise of its legislative power, we acknowledge Congress's authority to create subsidiary lawmaking functions in others, including the courts.⁶⁵ Granted that, in the 21st Century, the Court should focus its energies on the statutes that now dominate the legal landscape (as they assuredly did not in 1789), and conceding as well that legislative processes are often superior to judicial ones in acquiring the information on which sound policy can be made, we cannot blink the inevitable lawmaking implicit in judicial decision of unanticipated matters. To do so is either to put intolerable strain on what is denominated statutory construction or, as Justice Jackson argued, to render the federal system "impotent."

Toward the beginning of the last century, progressive commentators urged the use of statutes as

⁶¹ O.W. Holmes, *Collected Legal Papers* 295-96 (1920).

⁶² See, e.g., Harry Jones, *Some Causes of Uncertainty in Statutes*, 36 A.B.A.J. 321 (1950).

⁶³ *Op. cit n.* 40 above

⁶⁴ E.g., the oft-cited dicta in *Texas Industries v. Radcliffe Materials*, 451 U.S. 630, 640 (1981).

⁶⁵ See, for example, Frank Easterbrook, *Statutes' Domains*, 50 U.Chi.L.Rev. 533, 544 ff.(1983), invoking the example of the Sherman Act.

preferable sources of instruction for the courts in building towards coherent and just law, a process they identified with the common law.⁶⁶ Such uses are not interpretation as such – yet they are no more law-making, in the precedential sense or in their operation on individuals, than interpretation. So long as one maintains the common law habits of *stare decisis*, taking the view that “federal tribunals” are limited to statutes and to what they say hardly abandons the practice, nonetheless, of making law.⁶⁷ To turn simply to statutes one by one, without a sense of responsibility for constructing (as best may be) a unified whole, is nonetheless to give up the quest for coherence;⁶⁸ this molecular capacity to legislate, that has been so important to the appropriate functioning of the law, is simply wiped away. It abandons is the sense of partnership, of supportive collaboration in a mutual enterprise, for a stance that, at heart, subordinates Congress and insists on ultimate judicial authority as strongly as did Justice Brewer.

One can, indeed, often find in the interstices of the Court’s opinions continuing recognition of their necessary common law role even as it sensibly also characterizes that role as subordinate to the Congress. When operating in the shadows of federal statutes the Court unselfconsciously often writes simply as a common-law court. A unanimous opinion decided in the same Term as *Geier* implicitly affirms the point, while also suggesting a principled basis for prudential caution. *Pergram v. Herdrich*,⁶⁹ concerning a health management organization’s possible liability for the harm a patient suffered as the result of a medical judgment its policies were alleged to have induced, led the Court into an extended discussion of fiduciary responsibilities under common law trust principles. With ERISA lurking in the background, this would plainly have been a federal question, and the discussion proceeds unselfconsciously in just the manner of late nineteenth century Supreme Court discussions of issues of general commercial law. At an early point in the argument, the Court considered whether to adopt a distinction proposed by the plaintiff-respondent that, if successful, would considerably have narrowed the sweep of a decision in her favor (and thus, arguably, made it more palatable for judicial adoption). Said the Court:

any legal principle purporting to draw a line between good and bad HMOs would embody, in effect, a judgment about socially acceptable medical risk. A valid conclusion of this sort would, however, necessarily turn on facts to which courts would probably not have ready access: correlations between malpractice rates and various HMO models, similar correlations involving

⁶⁶ Roscoe Pound, *Common Law and Legislation*, 21 Harv.L.Rev. 383 (1908); Harlan F. Stone, *The Common Law in the United States*, 50 Harv.L.Rev. 4 (1936).

⁶⁷ See, e.g., *Neal v. United States*, 516 U.S. 284 (1996), in which the Court invokes *stare decisis* to require rigid adherence to its reading of a statute, once given, that could readily have been read in another way. In civilian jurisdictions, the text with all of its possibilities– not the Court’s limiting judgment about its meaning – would continue as the controlling element.

⁶⁸ Compare *Egelhoff v. Egelhoff*, decided March 21, 2001, in which the two authors in *Geier*, Justices Breyer and Stevens, joint in a dissent criticizing their colleagues for just such a failure of sensitivity.

⁶⁹ 120 S.Ct. 2143 (2000)

fee-for-service models, and so on. And, of course, assuming such material could be obtained by courts in litigation like this, any standard defining the unacceptably risky HMO structure (and consequent vulnerability to claims like Herdrich's) would depend on a judgment about the appropriate level of expenditure for health care in light of the associated malpractice risk. But such complicated fact-finding and such a debatable social judgment are not wisely required of courts unless for some reason resort cannot be had to the legislative process, with its preferable forum for comprehensive investigations and judgments of social value, such as optimum treatment levels and health care expenditure. Cf. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 665—666 (1994) (opinion of Kennedy, J.) (“Congress is far better equipped than the judiciary to ‘amass and evaluate the vast amounts of data’ bearing upon an issue as complex and dynamic as that presented here” (quoting *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 331, n. 12 (1985))); *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 513 (1982) (“[T]he relevant policy considerations do not invariably point in one direction, and there is vehement disagreement over the validity of the assumptions underlying many of them. The very difficulty of these policy considerations, and Congress’ superior institutional competence to pursue this debate, suggest that legislative not judicial solutions are preferable” (footnote omitted)).

The reasoning here is not that federal courts *cannot* adopt suggested legal principles in common-law fashion, but that it may be unwise for them to do so when those principles turn on assessments better suited for legislative than adjudicative fact-finding. The parallel to the conventional arguments for preferring rulemaking to adjudication in administrative policymaking – while not excluding the latter as an available option to be used by the adjudicator as it finds it required – are evident.

The author of the *Geier* dissent, Justice Stevens, has in other contexts upbraided his colleagues for their failures to respect the incremental and reasoned processes of the common law.⁷⁰ As judges *are* lawmakers, the habits of the common law are what restrain them from running amok. That risk is equally present among state judges as federal, particularly as regards federal matters; and federal judicial control seems important to guard against its fruition.

Where all this is going, I would not venture to predict. Discussions of federalism, statutory interpretation, or one’s attitude toward congressional fact-finding generally find the Court split along predictable lines. But not these issues. Every Justice save perhaps Justice Breyer has subscribed to an opinion raising questions in one or another context about the common law functions of federal courts. The discomfort is widespread, and it is perhaps more instinctual than intellectual, a realization that the ground has shifted without yet quite knowing what to do about it. In the repeated arguments about precedent, the perhaps unexpected adherence to precedent in cases like *Dickerson*, one can find expression of the tensions between the prior model of judging, and the new powers of policy-directed choice. We cannot deny that what it means to be a court has changed, although the change has nothing to do with original

⁷⁰ *Patterson v. McLean Credit Union*, 491 U.S. 164, 222 (1989); *Central Bank of Denver v. First Interstate bank of Denver*, 511 U.S. 164, (1994).

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understandings; it is the product of the last century's changes in how law is made and, in particular, in the nature of judicial review. The certiorari function brings forward the law-making side of judging, and at the same time reflects a weakening of the possibilities for hierarchical control within the judiciary. Our common-law premises cannot explain either development. In groping for an understanding and accommodation, the Justices appear often enough to be behaving in the familiar, unconscious mode. In the unspoken battle between agenda-setting and judging, we should all hope judging wins.